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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1988

WJW-TV, INC.,
Petitioner,

v.

CITY OF CLEVELAND, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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June 12, 1989

QUESTION PRESENTED

A Federal District Court granted a television station (1) a *declaratory judgment* that a City's previous arbitrary closure of one of its Council meetings violated the station's First Amendment rights, (2) an *injunction* that prohibits the City from arbitrarily closing its Council meetings, and (3) the station's attorneys' fees.

While the District Court's order was pending appeal before the Court of Appeals of the Sixth Circuit, the Ohio Supreme Court awarded *mandamus* relief to a newspaper which had challenged the closure of the same City Council meeting in an action in a State Court on the basis that the closure violated the City's Charter. The television station was not a party to the action brought by the newspaper in state court.

The question presented by this Petition is whether the television station's Federal action was rendered moot by the State Court decision that failed to grant, either expressly, impliedly or constructively, the remedial relief granted in the Federal action?

PARTIES

Due to a change in ownership after commencement of this action, the name of the Petitioner, WJW-TV, Inc. has changed to "Gillett Broadcasting of Ohio, Inc." Despite the change in ownership, the Petitioner continues to own and operate a television station in Cleveland, Ohio known as "WJW-TV8". Petitioner is not a subsidiary or affiliate of any publicly owned corporation.

The Respondents in this action are the City of Cleveland; the Cleveland City Council; the President of the City Council, George Forbes; and the Mayor of Cleveland, George V. Voinovich.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WJW-TV, INC., Petitioner

v.

CITY OF CLEVELAND, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, WJW-TV Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on March 16, 1989.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the Appendix hereto, p. A1, *infra*.

The opinion of the District Court for the Northern District of Ohio is reported at 686 F.Supp. 177 (N.D.Ohio 1988), and is reprinted in the Appendix hereto, p. A14, *infra*.

JURISDICTION

Invoking Federal Jurisdiction under 42 U.S.C. §1983, the petitioner brought this suit in the Northern District of Ohio.

On March 30, 1988, the Northern District granted Petitioner injunctive and declaratory relief. See p. A24, *infra*.

On Respondents' appeal, the Sixth Circuit Court of Appeals, on March 16, 1989, held that the case was moot and vacated the decision of the Northern District Court and remanded the case with instructions to dismiss the complaint. See p. A13, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

U.S. CONST. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. art. III, cl. 1.

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,--to all Cases affecting Ambassadors, other public Ministers and

Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a party;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. §1983 (1988)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The controversy underlying this case began on November 18, 1986 when 20 of 21 Cleveland City Council members, the Mayor of the City of Cleveland, the Clerk of Council and various City Directors and Mayoral aides held a pre-arranged meeting in the Mayor's office to discuss various issues of public interest to the City's residents. *WJW-TV, Inc. v. City of Cleveland*, 686 F.Supp. 177, 178 (N.D.Ohio 1988). Although City Council meetings traditionally had been open, the November 18 meeting was summarily closed to the public, including a reporter and a television cameraman for petitioner WJW-TV (hereinafter "WJW"), a Cleveland television station, and a reporter and photographer for the Plain Dealer, a Cleveland newspaper. No reason was given for such closure, and no record was kept of the meeting.

While the meeting was being conducted, the Plain Dealer filed an action in State Court (the Eighth District Court of Appeals for Cuyahoga County, Ohio). It requested a writ of mandamus ordering its immediate admission into the meeting. The Plain Dealer's demand was based on its allegation that the closure of the meeting violated the "open meeting" provision of the Cleveland City Charter, and the free press clause of the Ohio Constitution (Ohio Const., Art. 1, § 11.) *WJW-TV, Inc. v. City of Cleveland, et al.*, slip op., 88-3341, at 4 (6th Cir. 1989) (hereinafter "WJW-TV"). On November 24, 1986, the Ohio Court of Appeals dismissed the petition of the Plain Dealer as moot because the meeting that was the subject of the petition had already concluded. *Id.* Thereafter, the Plain Dealer appealed to the Ohio Supreme Court.

WJW's initial response to the City's actions was more restrained. WJW wrote to the Mayor and Council President protesting the closure of the

November 18 meeting and seeking assurances that such closure would not occur again. In response, these officials maintained that the City had the right to close such meetings.[1] Faced with the City officials' intransigence, WJW had two options: 1) fight for its (and the public's) right of access to Council meetings; or, 2) walk away from the controversy, with its tail tucked nicely between its legs. On June 19, 1987, WJW filed its suit in the United States District Court for the Northern District of Ohio, seeking injunctive and declaratory relief against the City of Cleveland, the City Council, the Council President, and the Mayor.

WJW alleged that the denial of access to the November 18 meeting constituted an abridgement of: (1) WJW's rights as guaranteed under the First Amendment of the United States Constitution; (2) Ohio's Sunshine Law (Ohio Rev. Code §121.22); and, (3) the open meeting provision of the City of Cleveland's Charter. *WJW-TV*, slip op., at 2-3. There was no dispute as to any material facts in the District Court action; accordingly, the parties filed cross motions for summary judgment. *Id.*

On March 30, 1988, the District Court granted summary judgment in favor of WJW. *WJW-TV*, 686 F.Supp. at 181. The district court granted declaratory and injunctive relief as follows:

> 1) A declaratory judgment is hereby entered that the first amendment requires all City Council meetings to be open to the public, except those in respect of which specific findings

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[1]Subsequently, Council did hold more secret meetings [*See, Forbes Bars Press, Fans Council Dissent*, The Plain Dealer, Sept. 12, 1987, at p. 10-B; and *Blacks, Whites in Council Hold Separate Caucuses*, The Plain Dealer, Dec. 9, 1987, at p. 1-A].

supporting confidentiality have been made on the record, as explained herein;

2) the City is hereby permanently enjoined from closing any Council meeting, save those excepted above, to the public;

3) the Court shall make an award of reasonable attorneys' fees and costs [to WJW] . . . .

Id. The City of Cleveland appealed the decision of the District Court to the Sixth Circuit.

While the instant case was pending before the Sixth Circuit, the Ohio Supreme Court rendered its decision in the Plain Dealer case on August 11, 1988. The Court concluded that the Plain Dealer case was not moot, and that the conduct of the City of Cleveland, in closing its meeting to the public, had violated the open meeting provision of the Cleveland City Charter. *State, ex rel. The Plain Dealer v. Barnes,* 38 Ohio St. 3d 165, 167 (1988) (hereinafter "*Barnes*"). The only relief granted by the Ohio Supreme Court was the peremptory writ of mandamus prayed for by the Plain Dealer. *Id.*

Thereafter, the Sixth Circuit vacated the District Court's decision in *WJW-TV* and instructed the District Court to dismiss WJW's action on the basis of mootness. The Court of Appeals held that the decision of the Ohio Supreme Court in *Barnes* rendered the District Court action moot, notwithstanding the fact that the Barnes and *WJW-TV* actions had been filed in different courts, the fact that the *Barnes* decision granted no prospective relief, and the fact that WJW

was afforded no remedy for the City's violation of its First Amendment rights. *WJW-TV*, slip op. at 7.

By its petition for certiorari, WJW seeks review of the Sixth Circuit's application of the mootness doctrine. It asks the Supreme Court to determine whether the Sixth Circuit was correct to order dismissal of WJW's Federal Court action based on a State Court decision that: (1) involved a different plaintiff; (2) granted no prospective relief; and, (3) granted no remedy or relief to WJW for the City's violation of its First Amendment rights.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The U.S. District Court for the Northern District of Ohio granted WJW injunctive and declaratory relief against the City of Cleveland based on the City's denial of public access to the November 18 meeting. The Sixth Circuit, however, vitiated these remedies and ordered dismissal of WJW's action on the basis that the intervening State Court decision in *Barnes* had mooted the Federal action despite the fact that the *Barnes* decision granted no injunctive, declaratory, or any other prospective relief. WJW questions whether its Federal challenge to the City's denial of public access to the City Council meeting should have been dismissed as moot where its injury was not remedied expressly, impliedly or constructively as a result of the *Barnes* decision.

WJW contends that the Sixth Circuit's dismissal of its case was inappropriate and that U.S. Supreme Court precedent demonstrates that the Sixth Circuit's broad application of the mootness doctrine in this case was erroneous. WJW concedes that there is apparently some disagreement among the Circuit Courts of Appeal as to how broadly mootness should be applied, particularly where multiple forms of relief, including declaratory, are sought. WJW requests, therefore, that the Supreme Court review the Sixth Circuit's application of mootness in order to clarify a gray area of the law--namely, *whether a State Court decision may moot a Federal Court action where the State Court action fails to grant (expressly, impliedly or constructively) the remedial relief granted in the Federal action.*

A. WJW Has a Right to Legal Action

As a member of the public, WJW suffered harm as a result of the Cleveland City Council's denial of

public access to the November 18 meeting. When a legal right is violated to the injury of another, a right of action is created in favor of the injured party, who may then put in motion the law of the remedy against the wrongdoer. It is a principle of the common law that wherever the law gives a right or prohibits an injury, it also gives a remedy either by a suit in equity or by an action at law. *Marbury v. Madison,* 1 Cranch (U.S.) 137, 163, 2 L.Ed. 60, 69 (1803). It is said that "a legal right without a remedy would be an anomaly in the law." *Peck v. Jenness,* 7 How. (U.S.) 612, 623, 12 L.Ed. 841, 846 (1843).

In addition to the common law right of remedial relief, citizens who have their federal constitutional rights violated under color of law are expressly entitled to a remedy under 42 U.S.C. §1983, which provides that every person who, under color of statute, subjects a citizen to the deprivation of any rights shall be liable to the party injured in an action at law for redress. See *Monroe v. Pape,* 365 U.S. 167, 183-84 (1961)[2]; *Parratt v. Taylor,* 451 U.S. 527, 532-33, 535 (1981).

B. WJW Has a Right to Injunctive and Declaratory Relief

The District Court has held that the City's denial of access of WJW to the November 18 meeting violated WJW's First Amendment rights. Where a party's First Amendment rights of freedom of speech and press are infringed, the remedial relief normally prayed for is injunctive. *See e.g., Krahm v. Graham,* 461 F.2d 703 (9th

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[2]Overruled on other grounds *Monell v. Department of Social Services,* 436 U.S. 658 (1978); and overruled on other grounds *Ingraham v. Wright,* 430 U.S. 651 (1977); and overruled on other grounds *Parratt v. Taylor,* 451 U.S. 527 (1981).

Cir. 1972); *414 Theater Co. v. Murphy*, 499 F.2d 1155 (2nd Cir. 1974).

Injunctive relief is appropriate in such cases because of the irreparable nature of the injury inflicted by First Amendment violations, particularly where the press is denied access to a government meeting or hearing [See, Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1329 (Blackmun, Circuit Justice 1975):

> Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. . . . To this extent, any First Amendment infringement that occurs with each passing day is irreparable. (emphasis added).

See, also, Moore v. City of East Cleveland, 431 U.S. 494, 528 at n. 3 (1978) (Burger, C.J. dissenting)].

In addition to injunctive relief, declaratory relief is appropriately prayed for where it is necessary for the protection or enforcement of rights, or for the redress of injuries inflicted by the violation of rights. 28 U.S.C.S. §2201 (1988).

With these principles in mind, WJW filed its Federal action seeking injunctive and declaratory relief challenging the denial of public access to meetings of the Cleveland City Council.

C. *The Sixth Circuit's Application of the Mootness Doctrine Was Incorrect*

WJW recognizes that Courts are required to decline jurisdiction where there is no genuine and existing controversy calling for present adjudication. WJW further acknowledges that a Federal action may

become mooted as a result of the issuance of a decision in a State Court. The dispute herein lies not with these established principles of mootness. Rather, WJW disputes the broad application of mootness undertaken by the Sixth Circuit. In this case, WJW's action was mooted by a State Court decision which had no injunctive, declaratory, or otherwise prospective impact, such as was prayed for, and granted, in WJW's Federal District Court action.

1. *The Barnes Decision Did Not Grant Any Prospective Relief*

Although the Sixth Circuit correctly recognized that the *Barnes* and *WJW-TV* actions arose from the same circumstances, it failed to note that the *Barnes* holding granted nothing more to the Plain Dealer than mandamus relief--*an order requiring the City Council to grant public access to a meeting that ended 21 months earlier*. The *Barnes* decision had no prospective impact whatsoever. Indeed, two Justices of the Ohio Supreme Court recognized the lack of prospective relief afforded by *Barnes* and argued that an injunction should issue:

> [T]here is nothing in the majority opinion that provides any sanction for a violation of the spirit of the decision . . . . Absent [an injunction], there is nothing to prevent the city council from holding a "gathering" of persons elected to the Cleveland City Council where, just incidentally, city business is discussed.

Id. at 169-70, Sweeney and Douglas, JJ. concurring.[3]

In its Federal action, WJW did not seek mandamus relief. It recognized that the meeting to which access was denied had concluded. Instead, it sought injunctive and declaratory relief in order to prohibit the City Council from closing future meetings as it had on November 18.

In light of the limited relief granted in *Barnes*, any apparent, prospective compliance with its holding by the Cleveland City Council amounts to nothing more than voluntary cessation of the allegedly wrongful conduct. Mootness, however, may not be applied on the basis of voluntary cessation except where it is demonstrated that there is no reasonable expectation that such wrongful conduct will recur. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The Cleveland City Council made no showing that its conduct is unlikely to recur. Furthermore, the Council's recurring practice of excluding the press from meetings is widely known. The Ohio Supreme Court itself commented on the Council's "practice of excluding the press and public from certain of its meetings." *Barnes*, 38 Ohio St.3d at 166. Justices Douglas and Sweeney went even further. They stated that City Council "intends" to deny public access "in the future." *Id.* at 170.

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[3]No one knows the loopholes left by the *Barnes* decision better than Council President Forbes, who, eleven days after the *Barnes* decision, called for "split" Council meetings, from which the public was to be barred. [*See, Split Council Meetings are Likely to Be Closed*, The Plain Dealer, August 23, 1988, at p. 1-A].

2. *As WJW Was Afforded No Relief by the State Court Decision, Its Federal Action Should Not Have Been Dismissed On the Basis of Mootness*

Petitioner questions whether a State Court decision may moot a Federal Court action where the State Court decision fails to grant (expressly, impliedly or constructively) the remedial relief prayed for, and granted in, the Federal action. WJW raises this issue in light of U.S. Supreme Court cases that illustrate the interrelationship of the remedial effects arising when Federal actions validly are validly mooted by intervening decisions of State Courts. Such a case is *Aikens v. California*, 406 U.S. 813 (1972), where the Supreme Court, having granted certiorari to review a California state prisoner's contention that his sentence of death violated the Federal Constitution, dismissed the writ as moot after the California Supreme Court issued a retroactive decision holding capital punishment in California invalid under the State Constitution. *Id.* at 814. Since the prisoner-petitioner in *Aikens* "no longer face[d] a realistic threat of execution" due to the invalidation of the death penalty statute, he essentially received the relief he sought despite the U.S. Supreme Court's dismissal of his action on the basis of mootness. *Id.*

In a similar vein, the Court in *Geduldig v. Aiello*, 417 U.S. 484 (1974), dismissed as moot the Federal appeal of four women challenging the constitutionality of a California disability insurance statute which excluded from coverage certain disabilities resulting from pregnancy. While the *Geduldig* case was on appeal, the California Court of Appeal, in an action brought by different plaintiffs, held that the statute did

not bar the payment of the benefits sought by the *Geduldig* plaintiffs. *Id.* at 490-92. As in *Aikens*, the plaintiffs in *Geduldig* received essentially the same relief, as a result of the State Court adjudication, that they were seeking in their Federal action. Unlike the plaintiffs in *Aikens* and *Geduldig*, WJW was not granted the relief it sought, and had been granted, in Federal Court as a result of the State Court decision. Instead, WJW (and the general public) was stripped of its prospective relief by the Sixth Circuit's application of mootness.

3. *The Sixth Circuit Did Not Account for the Multiple Forms of Relief Granted WJW*

Despite the limited impact of the *Barnes* holding, the Sixth Circuit did not consider the varied types of relief sought in *Barnes* and *WJW-TV* to be a material factor in its application of mootness. In this regard, the Sixth Circuit appears to be in discord with the U.S. Supreme Court and several other Circuit Courts of Appeal.

It is fairly well-settled that where several forms of relief are requested and one of these requests subsequently becomes moot, the remaining requests should still be addressed. *Powell v. McCormack*, 395 U.S. 486, 496 at n.8 (1969); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).

In *Super Tire*, the Supreme Court was confronted by a mootness argument raised by the defendant-union in an action brought against it by an employer challenging a New Jersey welfare statute which afforded benefits to striking employees. While the case was pending, the labor strike at issue ended and the strikers returned to work. 416 U.S. at 121. The Court declined to dismiss the action on the basis of mootness

because the employer had, from the very beginning, sought declaratory relief in addition to an injunction. The Court noted that although:

> [T]he case for an injunction dissolved with the subsequent settlement of the strike and the strikers returned to work, the parties to the principle controversy . . . may still retain sufficient interests and injury as to justify the award of declaratory relief.

Id., 416 U.S. at 121-22. The relevant question set forth by the Court in *Super Tire* was:

> "[W]hether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.". . . And since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here "capable of repetition, yet evading review," so that petitioners are adversely affected by government "without a chance of redress."

Id., 416 U.S. at 122 (citations omitted). The *Super Tire* Court found that the declaratory judgment action had not been rendered moot although one form of relief sought, an injunction, could no longer be granted by the Court. *Id.*

The application of *Super Tire* and its directive that an action not be rendered moot where multiple

forms of relief are requested and that the underlying controversy remains alive, has varied among the Circuit Courts of Appeal. In *Caiola v. Carroll*, the Circuit Court for the District of Columbia held that an action challenging the debarment of two officers of a validly debarred corporation was not moot as to its demand for declaratory relief, despite the fact that the period of debarment imposed had expired, thereby rendering the prayer for injunctive relief moot. 851 F.2d 395, 401 (D.C.Cir. 1988).

Other Circuit Courts of Appeal have similarly applied the multiple relief standard enunciated in *Super Tire* [*See, Olagues v. Russoniello*, 797 F.2d 1511, 1515-16 (9th Cir. 1986) (U.S. Attorney's termination of challenged voter fraud investigation did not moot the challenge to the legality of the investigation where termination was not irrevocable); *Florida Board of Business Regulation v. National Labor Relations Board*, 605 F.2d 916, 919-20 (5th Cir. 1979) (action challenging representation election of jai alai association employees was not "live" where the election had occurred prior to judicial decision, but remained viable for declaratory judgement purposes because of state's broad interest in regulation of jai alai industry); *Brown v. Scott*, 602 F.2d 791, 792 (7th Cir. 1979) (challenge to residential picketing statute not moot for purposes of declaratory judgement action even though mayor whose house was picketed was no longer in office when issue came before Court of Appeals); *Jones v. Califano*, 576 F.2d 12, 20 (2nd Cir. 1978) (challenge to a social security regulation was not mooted as to a prayer for declaratory relief despite the fact that the plaintiff was no longer subject to the regulation at issue)].

Other Circuit Courts of Appeal, however, have applied the multiple relief standard narrowly. In *Jersey Central Power and Light Co. v. State of New Jersey*, 772 F.2d 35 (3rd Cir. 1985), the Third Circuit deemed

moot a challenge to a state's interference with shipments by a utility along a route approved by the federal Nuclear Regulatory Agency where the shipment had been completed. *Id.* at 40. The state argued that the Court of Appeals should issue a declaratory judgment notwithstanding the factual resolution of the controversy given the significance of the issue of state power over nuclear regulation. The Third Circuit declined, however, holding that the controversy at issue was not sufficiently likely to recur so as to warrant declaratory relief. *Id.*

The Sixth Circuit's application of mootness in the underlying action, notwithstanding the prayer for multiple forms of relief, reflects the narrower approach to such cases as applied by the Third Circuit. The mooting circumstances in the underlying action, however, are even more attenuated than those in *Jersey Central.* The Sixth Circuit ordered dismissal of WJW's demand for declaratory relief despite the fact that the *Barnes* decision afforded WJW no relief for the harm inflicted upon it as a result of the City Council's denial of access to the November 18 meeting.

Not only was the Sixth Circuit's dismissal of WJW's declaratory judgment action questionable, but it is dubious whether the intervening *Barnes* decision should have mooted WJW's request for injunctive relief as well. In the underlying case, prayers for injunctive and declaratory relief remain viable given the entirely retrospective and narrow impact of the mandamus relief afforded by the Ohio Supreme Court in *Barnes.*

D. *Cases Dealing With Governmental Denial of Public Access to Governmental Meetings and Procedures are of Special Importance.*

In public access cases, the United States Supreme Court and Circuit Courts of Appeal, other than the

Sixth Circuit, have shown a reluctance to dismiss as moot cases where intervening events have arisen which are considerably more direct than those which arose in the underlying case as a result of the decision in *Barnes*.

For example, in *NBC v. Communications Workers of America*, 860 F.2d 1022 (11th Cir. 1988), NBC's action seeking injunctive relief based on its denial of access to a union convention was not deemed moot where the convention had ended before the Court of Appeals addressed NBC's appeal challenging a temporary restraining order denying all press access to the convention. The court held that the denial of access was capable of repetition, yet evading review. *Id.* at 1023-24. This standard has also been applied by the Supreme Court in other access cases [*See, Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8-9 (1986)].

Courts have declined to readily apply mootness in public access cases, in part, on the basis that such denial by government bodies is a frequently recurring, and constitutionally significant, event. *Press-Enterprise*, 478 U.S. at 8-9. Notwithstanding a string of major Supreme Court decisions on the topic of denial of public access, cases continue to be filed routinely wherein members of the general public and/or media entities are protesting a denial of their access to a government meeting or hearing.[4]

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[4]In the last two years alone, a number of cases have been reported where media entities have been compelled to file suit in state and federal courts to protest closure of a meeting of government officials. *See e.g., Society of Professional Journalists v. Secretary of Labor*, 832 F.2d 1180 (10th Cir. 1987)(media organization filed lawsuit challenging Mine Safety and Health Administration's closure of hearings investigating mine disaster); *In Re Astri Investment Management and Securities Corp.*, 88 Bankr. L. Rep. (CCH) ¶72,453 (D.Md. 1988)(newspaper challenged denial of access to bankruptcy creditors meeting); *Buffalo Evening News v. Buffalo Municipal Housing Authority*, 510 N.Y.S.2d 422 (1986)(newspaper challenged closed session of three members of city housing commission held evening before

E. *The Impact of the Underlying Decision is Significant*

Given the importance placed on public access by the Court, the summary dismissal of WJW's action by the Sixth Circuit on the basis of broad application of mootness was significant. Accordingly, the issue which arises from the underlying decision has broad impact on the public, press, government bodies, and the lower courts. Given the frequency with which controversies over the denial of public access to government hearings and meetings arise, persons must be assured that they may seek a remedy where their right of access is denied. It is generally the case that where the public is denied access by the government, more than one person is excluded. Such was the case in the instant matter. The decision of the Sixth Circuit, however, discourages persons from pursuing separate challenges to the denial, and constructively requires them to coordinate their legal attack in one forum, and to demand identical relief. Absent such coordination, the person with an action pending in one court, is necessarily estopped from obtaining relief because another person happened to obtain a positive judgment (albeit with different relief) in a different forum. The

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public meeting); *Deerfield Beach Publishing Inc. v. Robb*, 530 So.2d 510 (Fla. App. 1988)(newspaper challenged closed meeting of mayor and city council); *Annandale Advocate v. Annandale*, 418 N.W.2d 522 (Minn.App. 1988)(newspaper challenged closed meeting of city council); *City of Fort Myers v. News-Press Publishing Co.*, 514 So.2d 408 (Fla.App. 1987)(newspaper challenged closure of collective bargaining session); *Atlanta v. Pacific and Southern Co.*, 361 S.E.2d 484 (Ga. 1987)(television station challenged closure of city council's public safety committee); *Atlanta Journal v. Hill*, 359 S.E.2d 913 (Ga. 1987)(newspaper challenged closure of city administrative review panel); *Wisconsin ex rel. Newspapers, Inc. v. Showers*, 398 N.W.2d 154 (Wis. 1987) (newspaper challenged closure of sewerage commission meeting).

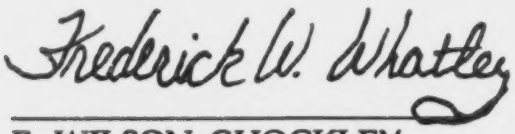
due process and First Amendment ramifications of this result are self-evident. In the wake of the Sixth Circuit opinion below, persons simply cannot proceed with any degree of certainty in enforcing their First Amendment rights.

Government bodies likewise cannot forecast probable judicial resolution of the challenged denial. A government body drawing lessons from the Sixth Circuit opinion may surmise that where separate actions are filed against it in different courts, it is advisable to advance the case wherein the narrower demand for relief is set forth. Such an approach invites abuse of process and muddles an area of law, namely public access, where it is critical that all parties involved proceed with a clear recognition of their rights under the Constitution and laws of the United States.

CONCLUSION

Based on the foregoing, WJW urges the Supreme Court to issue a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Sixth Circuit in the underlying matter.

Respectfully submitted,



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June 12, 1989

CERTIFICATE OF SERVICE

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WJW-TV, INC., Petitioner

v.

CITY OF CLEVELAND, et al., Respondents

I, Frederick W. Whatley, a member of the Bar of this Court, hereby certifies that on the 12th day of June, 1989, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Malcolm C. Douglas, Esquire, Office of Director of Law, City Hall, 601 Lakeside Avenue, Room 106, Cleveland, Ohio, 44114, counsel for all the respondents, herein. I further certify that all parties required to be served have been served.

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Counsel for Petitioner

APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

NO. 88-3341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WJW-TV, INC.,	)	ON APPEAL FROM
	)	THE UNITED
Plaintiff-Appellee,	)	STATES DISTRICT
	)	COURT FOR THE
v.	)	NORTHERN
	)	DISTRICT OF
CITY OF CLEVELAND, THE	)	OHIO
CITY COUNCIL OF THE CITY	)	
OF CLEVELAND; GEORGE L.	)	
FORBES, PRESIDENT OF THE	)	NOT
CITY COUNCIL OF THE CITY	)	RECOMMENDED
OF CLEVELAND; GEORGE V.	)	FOR FULL-TEXT
VOINOVICH, MAYOR, CITY	)	PUBLICATION.
OF CLEVELAND,	)	
	)	Sixth Circuit Rule 24
Defendants-Appellants.	)	limits citation to
	)	specific situations.
	)	Please see Rule 24
	)	before citing in a
	)	proceeding in a
	)	court in the Sixth
	)	Circuit. If cited,
	)	a copy must be
	)	served on other

) parties and the
) Court. This notice
) is to be prominently
) displayed if this
) decision is
) reproduced.

Decided and filed March 16, 1989

BEFORE: KRUPANSKY and GUY, Circuit Judges; and MEREDITH* District Judge

PER CURIAM. The City of Cleveland, the City Council and various officers of the city (referred to collectively as the city), defendants-appellants, have appealed from the decision of the United States District Court for the Northern District of Ohio, which granted summary judgment in favor of WJW-TV, Inc. (WJW), the plaintiff-appellee herein.[1]

The record disclosed the following undisputed facts. At 10:00 a.m. on November 18, 1988 a quorum of the City Council and the Mayor met in the Mayor's office to informally discuss a number of subjects which were scheduled on the agenda of the forthcoming City Council meeting. Several news reporters, including a reporter and a television cameraman for WJW, were permitted to photograph the participants, but were required to leave before the discussions were to begin.

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[1]Names as individual defendants in this action were the President of the City Council of the City of Cleveland, George Forbes; and the Mayor of the City of Cleveland, George Voinovich.

No transcript of the informal discussions were made. After the conference had concluded, a number of the participants reviewed the discussions which had taken place with representative of the media.

On June 19, 1987, WJW filed the instant action in the United States District Court for the Northern District of Ohio, and charged that the informal meeting was unlawful in that it had violated the First Amendment and had abridged the freedom of speech; that the meeting violated Ohio's Sunshine Law, Ohio Rev. Code §121.22; and that the meeting violated the open meeting provision of the City of Cleveland Charter.[2] The parties filed cross motions for summary judgment since the pertinent facts were not in dispute and resolution of the issues presented a question of law for the court to determine.

On March 30, 1988, the district court granted summary judgment in favor of WJW. *WJW-TV, Inc. v. City of Cleveland*, 686 F. Supp. 177 (N.D. Ohio 1988). Although the trial court recognized that it should

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[2] The relevant portion of the Charter of the City of Cleveland, section 28, states as follows:

> At seven o'clock p.m., on the first Monday in January following a regular Municipal election, the Council shall meet at the usual place for holding meetings, at which time the newly-elected members of the Council shall assume the duties of their offices. Thereafter the Ccuncil shall meet at such times as may be prescribed by ordinance or resolution. The Mayor, the President of the Council, or any five members thereof may call special meetings of the Council upon at least twelve (12) hours' written notice to each member of the Ccuncil, served personally on each member or left at the usual place of residence of such member. Any such notice shall state the subjects to be considered at the meeting and no other subjects shall be there considered. *All meetings of the Council or committees thereof shall be public and any citizen shall have access to the minutes and records thereof at all reasonable times.*

Cleveland City Charter, § 28 (emphasis added).

"avoid passing on a constitutional issue if a case can be disposed of without resort to [the asserted constitutional infringement]," *WJW-TV, Inc.*, 686 F. Supp at 178, it avoided addressing the pendent state law claims and decided only the federal constitution question, concluding that the First Amendment required that all city council meetings, formal or informal, be open to the press and public *except* in cases where the Council had made specific findings on the public record demonstrating that the closure of a particular meeting would serve a substantial governmental interest in maintaining the secrecy or confidentiality of its proceedings. The district court thereupon granted the following relief:

> 1) A declaratory judgment is hereby entered that the first amendment requires all City Council meetings to be open to the public, except those in respect of which specific findings supporting confidentiality have been made on the record, as explained herein; 2) the City is hereby permanently enjoined from closing any Council meeting, save those excepted above, to the public; 3) the Court shall make an award of reasonable attorneys' fees and costs [to WJW] . . . .

WJW-TV, Inc., 686 F.Supp. at 181. The court entered an order permanently enjoining the city from closing council meetings to the public in the future and awarded WJW its reasonable attorney's fees and costs.

The city filed a timely notice of appeal on April 13, 1988, and asserted that the district court erred in concluding that the First Amendment required the City of Cleveland to open its council meetings except where

the City had made a finding upon the public record that the facts underlying the particular meeting warranted a conclusion that a substantial governmental interest mandated that closure was necessary to protect the privacy or confidentiality of the meeting. A panel of this court granted a motion filed by the city to stay the enforcement of the permanent injunction granted by the district court pending appellate review. *WJW-TV v. City of Cleveland*, No. 88-3341 (6th Cir., order of July 18, 1988).

Subsequent to the order of this court staying enforcement of the district court's injunctive order, the Ohio Supreme Court issued it decision in a case arising from the identical facts presented in the instant appeal, *State ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St. 3d 165, 527 N.E.2d 807 (decision of August 11, 1988), wherein a reporter for the Plain Dealer Publishing Company (Plain Dealer) had also been requested to leave the same informal conference that had been convened in the Mayor's office on November 18, 1988. While that informal discussion was in progress, the Plain Dealer petitioned the Ohio Court of Appeals for Cuyahoga County for a writ of mandamus seeking immediate admission to the conference. The Plain Dealer alleged, inter alia, that the closed discussions violated the "open meeting" provision of the Cleveland City Charter, as set forth previously in footnote two *supra*. Additionally, the complaint alleged that the closed meeting violated the free press clause of the Ohio Constitution. Ohio Const., art. 1, § 11. On November 24, 1986, the Ohio Court of Appeals dismissed the petition of the Plain Dealer as moot because the conference which had been the subject of the petition had already concluded.

The Plain Dealer perfected an appeal to the Ohio Supreme Court. On August 11, 1988, the Ohio Supreme Court concluded that the conduct of the City of Cleveland, in closing the informal discussions of November 18, 1988 to the public, had violated the "open meeting" provision of the Cleveland City Charter.[3] *State ex rel. The Plain Dealer v. Barnes*, 38 Ohio St. 3rd at 167, 527 N.E.2d at 810. In *Barnes*, the Ohio Supreme Court noted that section 28 of the Charter of the City of Cleveland mandated that "all meetings of council and committees *shall* be public," *Barnes*, 38 Ohio St. 3d at 167, 527 N.E.2d at 800 (emphasis in original), emphasizing that "[t]he word 'shall' establishes a mandatory duty" concerning "*any* assemblage of the city council or its committees where a majority of members constituting the body are in attendance and the gathering is arranged for the purpose of discussing public business." *Barnes*, 38 Ohio St. 3rd at 167, 168-69, 527 N.E.2d at 810, 811 (emphasis in original).

The City of Cleveland has urged that the decision of the Ohio Supreme Court was dispositive of the issues joined by WJW and accordingly the instant appeal was moot because no live "case or controversy" remained for appellate review by this court. Because mootness is a threshold jurisdictional issue, this court must determine if an "actual controversy still exists between the parties." *Speer v. City of Oregon*, 847 F.2d 310, 311 (6th Cir. 1988); *see also Rettig v. Kent City School Dist.*, 788 F.2d 328, 330 (6th Cir.) ("Of initial concern to this court is the threshold issue of subject

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[3] As a preliminary matter, the Ohio Supreme Court concluded that the action was not moot because it was "capable of repetition, yet evading review." *State ex rel. The Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St. 3rd at 166, 527 N.E.2d at 809 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 5 L.Ed. 310 (1911)).

matter jurisdiction."), cert. denied, 478 U.S. 1005, 106 S.Ct. 3297, 92 L.Ed.2d 711 (1986). "Mootness is determined by examining whether an actual controversy between the parties exists in light of intervening circumstances." *Fleet Aerospace Corp. v. Holderman*, 848 F.2d 720, 723 (6th Cir. 1988), *on remand sub nom. from Ohio v. Fleet Aerospace Corp.*, _____ U.S. _____, 107 S.Ct. 1949, 95 L.Ed.2d 521 (1987), *vacating and remanding* 796 F.2d 135 (6th Cir. 1985); *accord Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986) ("Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief."); *Constangy, Brooks & Smith ex rel. Teledyne Indus., Inc. v. NLRB*, 851 F.2d 839, 841 (6th Cir. 1988) (same); *Speer*, 847 F.2d at 311 (same).

"Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. . . . It is not enough that a controversy existed at the time the complaint was filed. . . ." *Deakins v. Monaghan*, _____ U.S. _____, _____, 108 S.Ct. 523, 528, 98 L.Ed.2d 529 (1988); *accord Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471, 102 S.Ct. 752, 757, 70 L.Ed.2d 700 (1982) ("Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'"); *Affholder v. Preston Carroll Co.*, Nos. 86-5348, 86-5349, slip op. at 8 (6th Cir. Feb. 1, 1989) ("Article III of the Constitution confines the federal courts to adjudicating actual 'cases' or 'controversies.'") (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984)); *County of Oakland v. City of Detroit*, Nos. 86-1200, 86-1217, 86-1218, 86-1266, 86-1267, 86-1268, 87-1303, 87-1334, slip op. at 11 (6th Cir. Jan. 27, 1989) ("The Constitution makes it clear

that the judicial power vested in federal courts under Section 1 of Article III extends only to 'Cases' and 'Controversies.'"); *Rettig*, 788 F.2d at 330 ("Article III grants the federal courts jurisdiction over cases and controversies."). "To satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, and not simply on the date the action is initiated." *Rettig*, 788 F.2d at 330; *accord Fleet Aerospace Corp.*, 848 F.2d at 723. The Ohio Supreme Court, after interpreting state and municipal law, concluded that the City of Cleveland had violated the City Charter's "open meeting" provision by excluding members of the press from the informal council meeting thereby resolving the issue posed in the instant appeal and, as a consequence, there is no longer a live case or controversy presented to this court for determination upon appellate review. "If there is no case or controversy, this court lacks subject matter jurisdiction to hear this appeal even though the parties agreed below that the case was ripe for adjudication . . . ." *Michigan v. Meese*, 853 F.2d 395, 397 (6th Cir. 1988).

WJW News has argued that the intervening decision of the Ohio Supreme Court was not dispositive of the instant appeal because of a disparity between the parties to the instant appeal and the parties in *State of Ohio ex rel. Plain Dealer v. Barnes*; because the federal district court's decision was anchored upon a violation of First Amendment rights whereas the Ohio Supreme Court's opinion was based upon a violation of the Cleveland City Charter; and because a continuing possibility that the City of Cleveland would circumvent the mandate announced by the Ohio Supreme Court in *Barnes*, by either amending the City Charter or by ignoring the court's decision and simply ordering the closure of council

meetings at some point in the future, thereby necessitating the affirmance of the injunctive relief ordered by the federal district court.

Initially, a disparity between the parties in the instant action and the parties in *Barnes* is of no consequence in addressing the jurisdictional issue confronting this court. The underlying factual scenario resolved by the Ohio Supreme Court in *Barnes* arose from the identical facts joined in the instant case, namely the decision of the City of Cleveland to preclude the public including the media from attending the informal discussions of November 18, 1986 here in controversy. The conclusion announced by the Ohio Supreme Court in *Barnes*, that the City violated its "open meeting" charter provision by denying access to the Plain Dealer's news reporter, conclusively adjudicated the factual issue posed by appellee's cause of action by applying state and municipal law.

Nor does the Ohio Supreme Court's disposition of *Barnes* on principles of state and municipal law immunize this appeal from mootness simply because the federal district court's decision was predicated upon an alleged violation of First Amendment constitutional rights. *Detroit Fire Fighters Ass'n, Local No. 344, I.A.F.F. v. Dixon*, 572 F.2d 557 (6th Cir. 1978) (per curiam). In *Detroit Fire Fighters Ass'n*, plaintiffs, City of Detroit fire fighters, had initiated an action in federal district court alleging racially discriminatory conduct by the Fire Department in violation of the Fourteenth Amendment to the United States Constitution. The district court in *Detroit Fire Fighters Ass'n* had granted injunctive relief to the plaintiffs citing impingements of the federal Constitution, and the Fire Department timely appealed to this court. Pending appellate review, two state courts resolved the controversy pursuant to state law-

interpretation of the collective bargaining provisions. Upon reviewing the injunctive relief afforded by the federal district court, this circuit concluded that the final, non-appealable decision of a state appellate courts, which had conclusively adjudicated the factual dispute by applying state law, "rendered [the injunctive relief ordered by the federal district court] moot and ma[d!e it unnecessary . . . to decide the difficult constitutional issues presented" on appeal. *Detroit Fire Fighters Ass'n*, 572 F.2d at 559.

In the instant case, WJW News had alleged three counts in its complaint, two of which were anchored in state and municipal law. As in *Detroit Fire Fighters Ass'n*, the resolution of identical controversies by the Ohio Supreme Court pursuant to state and municipal law has avoided the necessity for an appellant review by this court to decide the federal constitutional question. "The general principle in cases involving a constitutional challenge is to avoid [a determination that a particular activity is] unconstitutional if the viable issues in the case may be disposed of on some

other reasonable basis."[4] *Fleet Aerospace Corp.*, 848 F.2d at 724.

Finally, WJW's assertion that the City of Cleveland could avoid the "open meeting" mandate of the City Charter at some undetermined future time by convening meetings with less than a majority of the council members, by amending the City Charter, or by ignoring the Ohio Supreme Court's decision in *Barnes* is insufficient to support the existence of a live case or controversy cognizable for appellate review. It is well established that "such speculative contingencies afford no basis for our passing on the substantive issues' . . .

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[4] In light of the determination that the instant appeal is moot, this court need not address the propriety of the federal district court's conclusion that the Supreme Court's decisions in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 2829, 65 L.Ed.2d 973 (1980) ("[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment. . .") (footnote omitted), and its progeny mandated that the City open all city council meetings to the press and public. *WJW-TV, Inc.*, 686 F. Supp. at 178-80. However, this court does note that by declining to consider WJW's state law claims before reaching the First Amendment claim, the district court erred in ignoring the Supreme Court's admonition that federal constitutional issues should not be decided where a dispute can be resolved on the basis of pendent state law claims.

> If the [challenged activity was] invalid under state law, the Court of Appeals need not have reached the federal constitutional issues. Nevertheless, the Court of Appeals declined to resolve the pendent state law claim. Under *Hagans v. Lavine*, 415 U.S. 528, 546, 94 S.Ct. 1372, 1383, 39 L.Ed.2d 577 (1974) and *Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), this was an abuse of discretion in the circumstances of this case.

Schmidt v. Oakland Unified School Dist., 457 U.S. 594, 595, 102 S.Ct. 2612, 2612, 73 L.Ed.2d 245 (1982); accord *Hagans v. Lavine*, 415 U.S. 528, 546-47 & n.12, 94 S.Ct. 1372, 1382-84 & n.12, 39 L.Ed.2d 577 (1974) ("The Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims."); *Siler v. Louisville & Nashville R. Co.*, 213 US. 175, 193, 29 S.Ct. 451, 455, 53 L.Ed.2d 753 (1909) ("Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."); *compare Fleet Aerospace Corp.*, 848 F.2d at 724.

in the absence of 'evidence that this is a prospect of "immediacy and reality.'" *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5, 94 S.Ct. 1704, 1707 n.5, 40 L.Ed.2d 164 (1974) (citations omitted). "The threat [alleged by WJW], based on the mere 'speculative contingenc[y],' . . . cannot be said to be 'sufficiently real and immediate to show an existing controversy.'" *Deakins*, ____ U.S. at ____ n.4, 108 S.Ct. at 529 n.4 (citations omitted). "What action the city . . . will take in the future in connection with [complying with the "open meeting" provision of the City Charter] is simply a matter of conjecture at this time. Courts do not rule on hypothetical cases." *Detroit Fire Fighters Ass'n, Local No. 344*, 572 F.2d at 559; *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 464, 81 L.Ed.2d 617 (1937) ("A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."); *Speer*, 847 F.2d at 311 ("If we cannot now effect the requested relief, any opinion that this court might render on the underlying dispute would be merely advisory, for plaintiff may no longer have any legally cognizable interest in the outcome.") (citing *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969)); *compare County of Oakland*, Nos. 86-1200, 86-1217, 86-1218, 86-1266, 86-1267, 86-1268, 86-1303, 86-1334, slip op. at 11 ("A dispute in which the interest of the complaining party is purely academic does not qualify as a case or controversy in the constitutional sense . . . ."). In the event that the City of Cleveland should, at some future time, undertake any of the speculated conduct posited, WJW would have access to the courts to adequately protect its legal rights by initiating legal proceedings in federal or state court at that time which would address actual issues and not conjectured possibilities. *See, e.g.*,

Deakins, _____ U.S. at _____ nn.4-5, 108 S.Ct. at 529 nn.4-5.

Finally, established precedent indicates that the appropriate remedy "[u]nder circumstances where a controversy has become moot before final appellate adjudication" is to remand the decision of the lower court with "instructions to vacate the judgment below and dismiss the complaint." *Constangy, Brooks & Smith*, 851 F.2d at 842; *see also Deakins*, _____ U.S. at _____, 108 S.Ct. at 528-29; *Hall v. Beals*, 396 U.S. 45, 50, 90 S.Ct. 200, 202, 24 L.Ed.2d 214 (1969); *compare Detroit Fire Fighters Ass'n, Local 344*, 572 F.2d at 560. "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance . . . . [and] is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Constangy, Brooks & Smith*, 851 F.2d at 842 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41, 71 S.Ct. 104, 107, 95 L.Ed.2d 36 (1950)). Accordingly, the judgment of the United States District Court for the Northern District of Ohio is **VACATED** and **REMANDED** with instructions to dismiss the complaint.

WJW-TV, INC., Plaintiff

v.

CITY OF CLEVELAND, et al.,
Defendants.

Civ. A. No. C87-1524.

United States District Court,
N.D. Ohio, E.D.

March 30, 1988.

MEMORANDUM AND ORDER

ANN ALDRICH, District Judge

Pending before the Court is a motion to dismiss, or in the alternative for summary judgment, of defendants City of Cleveland, the City Council, George L. Forbes, and George V. Voinovich ("the City"), and WJW-TV's brief in opposition and in support of its own motion for summary judgment. The parties agree that there are no genuine issues of material fact and seek only the resolution of the legal issues raised by the three counts in WJW-TV's complaint. Because

the Court is persuaded that WJW-TV was denied its first amendment right to attend a November 18, 1986 City Council meeting, it grants summary judgment in favor of WJW-TV and does not reach the pendent state claims contained in counts two and three of WJW-TV's complaint.

I

There are no disputed issues of fact in this case. All parties agree that on November 18, 1986, a pre-arranged meeting of City Council was held, at which twenty of the twenty-one Council members, Council President George Forbes, and Mayor George Voinovich, were present. Various issues of public interest to the city's residents were discussed. Several members of the news media, including reporters and cameramen from WJW-TV, had come expecting to be admitted, but were refused access. The City does not argue that the matters discussed at the meeting were in any sense privileged or confidential, or that other compelling reasons existed for denying access to the media. No findings to this or similar effect were made on the record. Nor does the City deny the existence of a tradition of public access to Council meetings. Despite this, the City maintains that it was its prerogative to close the Council meeting to the public and to the press.

WJW-TV argues that this denial of access to the Council meeting violated rights secured by the first amendment to the United States Constitution, by Ohio Revised Code § 121.22 [Ohio's so-called "sunshine law"], which requires all meetings of any public body to be open to the public, and by the City's Charter, which contains a provision requiring Council meetings

to be public. The City denies that its action violated any of these standards, and disputes this Court's jurisdiction to entertain the two pendent state law claims contained in counts two and three.

II

Count one of WJW-TV's complaint concerns the first amendment to the United States Constitution and its application to the issue of public access to the legislative process. While a court ought, ordinarily, to avoid passing on a constitutional issue if a case can be disposed of without resort to it, such a decision is often appropriate and necessary. Where, as here, such an issue is unavoidably implicated by the facts of a case, or, also as here, there are independent reasons for not deciding what would otherwise be dispositive extraconstitutional questions, the constitutional issue is appropriately addressed. Because the Court finds that the City's act of closing the Council meeting violated WJW-TV's rights under the first amendment, it grants summary judgment in favor of WJW-TV without addressing the remaining issues.

There is nothing in the language of the first amendment itself from which a right of public access to legislative proceedings may automatically be inferred. There is, in addition, a conspicuous dearth of case law bearing directly on the issue. Nonetheless, the existence of the right in question can be readily recognized once the rationale of analogous decisions is clearly understood.

Much of the applicable case law has concerned the public's, or the media's access to judicial, and in particular criminal, proceedings. The landmark

Supreme Court case of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), upon which WJW-TV heavily relies, established that a criminal trial must, except under certain limited conditions, be open to the public. The *Richmond Newspapers* Court was called upon to decide if a trial court had acted properly when, without considering less restrictive alternatives, it granted defense counsel's motion to close the trial to the public. The Court held that the judge's action violated the first and fourteenth amendments. It explained:

> The First Amendment, in conjunction with the Fourteenth, prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Id. at 575, 100 S.Ct. at 2826.

Passages such as this abound in the Court's opinion and make clear the *Richmond Newspapers* is a case about access not only to criminal trials, but equally to "matters relating to the functioning of government." Access to criminal trials is but a special case of a right to be informed about government which the Court held to be included in the first amendment.

The importance of *Richmond Newspapers*, as this Court understands the decision, lies both in its recognition of a public right of access to governmental proceedings, and in its restriction of the conditions

under which that right may be circumscribed. *Richmond Newspapers* must be read as having recognized only a "qualified right," to be sure, but one which cannot be qualified except for good cause. In the case of criminal trials, for example, the Court held that the public must be granted access "[a]bsent an overriding interest articulated in findings." *Id.* at 581, 100 S.Ct. at 2829.

That this is the best interpretation of the *Richmond Newspapers* opinion is evidenced by the elaborations to be found in its concurring opinions. Justice Stevens viewed the majority as having denounced "arbitrary" interferences with first amendment rights. He stated:

> Today . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

Id. at 583, 100 S.Ct. at 2831. Justice Brennan recognized that such restrictions as have in the past been placed by the Court on the public's freedom of access to information were justified by the nature of the information:

> Read with care and in context, our decisions must...be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.

Id. at 586, 100 S.Ct. at 2832. The privilege is also tempered by the context in which it is asserted: "An assertion of prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." It is apparent as well from Brennan's concurrence that he understood the significance of the case to extend far beyond the matter of access to criminal trials. In characterizing what he termed the "structural" role played by the first amendment "in securing and fostering our republican form of government," Brennan indicated that freedom of communication in general is of chief concern:

> Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, [84 S.Ct. 710, 11 L.Ed.2d 686] (1964), but also the antecedent assumption that valuable public debate--as well as other civic behavior--must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Id. at 588, 100 S.Ct. at 2833.

Subsequent Supreme Court decisions reinforce the conclusion that a first amendment right of access extends well beyond access to criminal trials. Although most of those decisions have dealt chiefly with press or public access to criminal trials in particular, a concern

for access to information about government generally appears to have informed the decisions. This concern, indeed, is typically invoked as the major premise from which the right of access to criminal trials may be inferred. Thus in *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 606, 102 S.Ct. 2613, 2619-20, 73 L.Ed.2d 248, the Court justified its freedom-of-access conclusion by saying that "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-605, 102 S.Ct. at 2619.

The Court's enunciation of the notion of a "qualified first amendment right," and of the special circumstances in which alone the right may be defeated, is also rehearsed in later decisions. *Globe Newspapers* made clear that

> the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where...the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-607, 102 S.Ct. at 2620. Then, in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 825-26, 78 L.Ed.2d 629 (1984), where the Court specifically extended the public's right of access to include voir dire examinations of prospective jurors, it spoke of a "presumption of openness" that

could be rebutted only by adducing strong, countervailing concerns. The Court added:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

An Alaska state court, in *League of Women Voters v. Adams*, 13 Med.L.Rep. 1433 (Super.Ct.1986), undertook an extensive review of the case law and concluded in its well reasoned opinion, as this Court concludes today, that a qualified right of access to legislative proceedings is an inescapable consequence of first amendment jurisprudence. "With these decisions in mind," the court said, "can it be doubted that public access to legislative meetings would even more directly and forcefully serve the goals of ensuring an informed electorate and improving our system of self-government?" *Id.* at 1442. The court applied the "historical" and "functional" tests enunciated by Justice Brennan in *Globe Newspapers*, finding each satisfied in the same degree by legislative as by judicial proceedings. The historical test was met, according to the court, because Alaska's legislative proceedings had traditionally been open to the public. Then, in applying the functional test, the court discussed the effect of holding open legislative committee meetings:

> It appears to this court that the effect would be salutary and that the benefits would be several. Indeed, virtually all of

> the advantages of openness which courts have found in regard to judicial proceedings, both criminal and civil, are equally applicable to the legislative process. These include the following:
>
> a) The integrity of the fact-finding process is enhanced by open proceedings.
>
> b) Public respect for the legislative process is increased by open proceedings.
>
> c) Open proceedings provide a "therapeutic outlet."...
>
> d) The ability of the public to engage in informed discussion of governmental affairs, to cast an informed ballot, and ultimately to improve our system of self-government are all enhanced by open proceedings.

Id. (emphasis omitted).

In conclusion, then, this Court finds that the existing case law and good sense compel its conclusion that the first amendment mandates that the legislative process be made generally available to the press and to the public. Because the public's is a qualified right of access, however, exceptions may be noted to the general rule, specifically in those instances, e.g., executive sessions, where an interest in confidentiality trumps. But on those occasions where compelling reasons exist for closing meetings to the public--and the law does recognize that there are such occasions--the governmental body in question must make those reasons public. It must make specific findings on the

record of the circumstances justifying closure. Under no circumstances may the closure be arbitrary, or may the legislative body assert an unqualified prerogative to close its meetings.

III

With the elements of a first amendment violation thus identified, the conclusion in this case is easily reached. There are, as has been stated, no disputed issues of material fact. The parties agree that the City Council held a meeting on November 18, 1986, that such a meeting was closed to the press and to the public, and that no findings were made on the record to justify the closure. The conclusion is thus inescapable that WJW-TV had a first amendment right to attend the Council meeting, and that this right was denied to it when its reporters and cameramen were refused access. The City does not assert that it had good, even if unrecorded, reasons for denying admittance to the news team. It asserts, rather, that it is under no obligation to produce such reasons, that the decision to hold open or closed Council meetings is its exclusive prerogative. The first amendment tolerates no such arbitrary action. A presumption always operates in favor of open government meetings, which presumption can be overcome only be a formal showing of a need for privacy or confidentiality. Because the City has, by its own admission, made no such showing, and because the remaining elements of a first amendment violation have been found to exist in this case, the Court grants summary judgment to WJW-TV with respect to its first amendment claim.

IV

The finding of a first amendment violation is sufficient to dispose of this case in its entirety. The Court need not pass on the issues presented by counts two and three of WJW-TV's complaint. The fact that the Ohio Supreme Court, on October 21, 1987, accepted jurisdiction over *Fox v. City of Lakewood*, Case No. 52354, slip op. (Cuy. Cty. App. Ct., June 11, 1987) [available on WESTLAW, 1987 WL 12626], Ohio Supreme Court Case No. 87-1363, moreover, counsels that this Court abstain from deciding the issue posed by count two. A ruling in *Fox*, which concerns the applicability of Ohio's "sunshine law," O.R.C. § 121.22, to charter municipalities, is expected in the near future. It would be improper for this Court to anticipate the resolution, one way or the other, of this issue of state law. While no such barrier prevents this Court from deciding whether the City's action violated its own charter, as WJW-TV claims in count three, this, too, is a pendent state law claim whose determination is not necessary to a resolution of this case.

V

Having found that no issues of material fact exist in this case and that the City's act of closing its November 18, 1986 Council meeting to the press and to the public violated the first amendment to the United States Constitution, the Court hereby grants summary judgment in favor of WJW-TV. The Court thus grants to WJW-TV the following relief, as demanded in its complaint: 1) A declaratory judgment is hereby

entered that the first amendment requires all City Council meetings to be open to the public, except those in respect to which specific findings supporting confidentiality have been made on the record, as explained herein; 2) the City is hereby permanently enjoined from closing any Council meeting, save those excepted above, to the public; 3) the Court shall make an award of reasonable attorneys' fees and costs after counsel for WJW-TV submits a fee petition, due by April 15, 1988, and counsel for the City submits any objections it may have thereto within ten (10) days thereafter.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR
CLERK

NO. 88-2027

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

WJW-TV, INC.,

Petitioner,

v.

CITY OF CLEVELAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CITY OF CLEVELAND, ET AL.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989
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WJW-TV, INC.

Petitioner

v.

CITY OF CLEVELAND, ET AL.

Respondents

BRIEF IN OPPOSITION OF RESPONDENTS CITY OF CLEVELAND, ET AL.

COUNTER STATEMENT OF THE QUESTION PRESENTED

Does a definitive determination of state law, upon the issue of whether a municipal council may close its meetings to the public, moot a district court decision granting declaratory and injunctive relief on constitutional grounds with respect to the same issue and upon identical facts?

COUNTER STATEMENT OF THE CASE

The petition of WJW-TV, Inc., owner of a Cleveland, Ohio, television station, tries to breathe life into a moribund dispute of a uniquely local character which was definitively resolved by state law.

The decision of the Court of Appeals, holding moot a District Court order concerning First Amendment access to meetings of local public officials, does not conflict with a decision of any other federal court of appeals. That determination, far from constituting a departure from the usual course of judicial proceedings, expounds and applies such uniformly accepted principles of adjudication as:

(1) Article III of the Constitution limits federal courts to the

adjudication of live and ongoing controversies (Opinion, Court of Appeals, Petitioner's Appendix, A8, A12); and

(2) federal constitutional issues should not be decided if a dispute can be resolved on the basis of state law claims (Opinion, Court of Appeals, Petitioner's Appendix, A10, A11).

The Facts

A recitation of the facts which gave rise to this case and a description of the course of parallel state litigation demonstrates the tenuous basis of the petition.

On November 18, 1986, Cleveland's City Council, its Mayor and sundry other City officials met privately to discuss, but not to act upon, various public issues. Such private meetings had been held on prior occasions and there was

support in Ohio case law for the claim of a right to meet in private or executive session.

Cleveland's daily paper, The Plain Dealer, immediately challenged the right of the City's officialdom to meet privately, seeking a writ of mandamus from an Ohio court of appeals requiring access to the meeting. The writ was denied and the newspaper promptly appealed of right to the Ohio Supreme Court. The prior owner of petitioner sought and was granted leave to file an amicus brief in the Ohio court and through the petitioner's present counsel filed extensive written argument in the Ohio Supreme Court.

In June, 1987, some seven months after the meeting in controversy, petitioner commenced the proceedings below, seeking declaratory and

injunctive relief with respect to the meeting of November 18, 1986 -- the same meeting at issue in the state court proceeding. The action was premised on First Amendment grounds and also set forth pendent state law claims.

Since the basic facts of the November 18, 1988 meeting were not in dispute, both parties filed dispositive motions in the District Court. In the meantime, the state law case was argued to the Ohio Supreme Court on March 1, 1988.

Although advised that state law litigation has been submitted to the Ohio Supreme Court, the District Court on March 30, 1988, issued its declaration and injunction holding upon First Amendment grounds that the meeting of November 1986 violated the Constitution and issued an injunction

prohibiting meeting closures by the City unless specific legislative findings supporting confidentiality were made. The City promptly appealed and thereafter sought and obtained a stay of the District Court's order.

On August 11, 1988, the Ohio Supreme Court issued a definitive exposition of Ohio law regarding the right of chartered Ohio municipalities to close their meetings to the public. In a decision and order far more restrictive and significantly more specific than the order of the District Court, the Ohio Court held that under Cleveland's Charter all meetings of a majority of the Cleveland Council or its committees must be open to the public and that no private or executive sessions might be conducted in the absence of a Charter provision adopted by the electors of the

City authorizing such sessions. State, ex rel. Plain Dealer Publishing Co. v. Barnes (1988), 38 Ohio St. 3d 165. It is obvious from a reading of the Ohio decision that legislative findings of the sort required by the order of the district court would not support meeting closure under Ohio law. Plainly and simply, all meetings of the Cleveland Council and its committees must be open to the public without exception. From the moment of the announcement of the Ohio Supreme Court decision, the declaration and order of the District Court was practically and legally a nullity.

The City did not petition the Ohio Supreme Court for rehearing or reconsideration, the City has at all times since the announcement of the Plain Dealer decision conformed with the

strictures of that decision and there is no movement afoot to amend the City Charter to permit private meetings of the Council. The issue is simply dead.

REASONS FOR DENYING THE WRIT

I. The Ohio Supreme Court Having Decided That All Meetings Of The Cleveland Council Must Be Open To The Public, The Issues Raised By Petitioner's Complaint Are Now Moot.

There can be little doubt that the basic substantive issue of whether meetings of the Cleveland City Council are open to the public and press was conclusively adjudicated at state law. The drift of petitioner's lament is that it no longer has a court order of its own. The Ohio Supreme Court, however, made it abundantly clear that Cleveland's Council must keep all of its meetings open to the public, a decision which redounds to the benefit of petitioner.

The Ohio Court, in a definitive declaration, held:

> As used in Section 28 of the Charter of the City of Cleveland, a "meeting" of the Cleveland City Council or any of its committees means any assemblage of the city council or its committees where a majority of members constituting the body are in attendance and the gathering is arranged for the purpose of discussing public business. Plain Dealer, supra, syllabus 3.[1] (Emphasis by the Court)

That Court in the text of its opinion went on to point out (Plain Dealer, supra, at pp. 167, 168):

> ... the Charter requires all meetings of council and its committees to be public and does so without exception.... We reject the proposition that council has implied authority to designate and hold special meetings of council or committees thereof in contravention of the more specific duty mandated by Section 28. (Emphasis by the Court)

---

1 In Ohio, the syllabus of a Supreme Court decision constitutes the law of the case. See authorities cited infra, p. 11.

Lest there by any doubt, the State Supreme Court specifically overruled two Ohio intermediate court decisions which sanctioned private or executive sessions of municipal councils. Plain Dealer, supra, at p. 168 (footnote 2).

And should there yet remain a residual concern regarding the purport of its decision in Plain Dealer, the Ohio Supreme Court two months later reaffirmed that holding in Fox v. Lakewood (1988), 39 Ohio St. 3d 19, 21:

> We also concluded in State, ex rel. Plain Dealer Publishing Co., supra, that the plain and ordinary meaning of such charter language restricts a municipal legislative authority from exercising whatever implied power it may have to engage in the practice of closed or executive sessions.

In sum, Plain Dealer, leaves nothing to the imagination or indeed creativity of respondent municipality.

First, the order is quite specific.

The Ohio court, unlike the district court, defined the term meeting ("any assemblage of the city council or its committees" attended by a majority ...)

Second, the state court order is all embracing ("all meetings of council and its committees must be public ..."). The Ohio ruling is more restrictive than the order of the district court which undertook to permit closed meetings upon legislative findings of confidentiality.

Finally, Plain Dealer is the ruling case law in Ohio. In Ohio, the syllabus of a Supreme Court decision constitutes the binding law of the case to be read in conjunction with the decided facts of the specific case. Perkins v. Benguet Mining Co., 342 U.S. 437, 441, footnote 3 (1952), Ohio Supreme Court Rules, Rule for the Reporting of Opinions, Rule 1. The syllabus of Plain Dealer, recited

above, read in conjunction with Cleveland Charter requirement that "[a]ll meetings of the Council or committees thereof shall be public..." constitutes about as succinct and specific a legal requirement as one might find.

Prolongation of a dispute over a meeting held nearly three years ago, or the mooted question of whether Cleveland's Council meetings must be open is, at best, pointless and will only muddy juristic waters cleared by the Ohio Supreme Court.

II. The Court Of Appeals Correctly Determined That There Was No Case Or Controversy For Adjudication.

Notwithstanding the specificity, breadth and finality of the Plain Dealer decision, petitioner argues that the issue of open council meetings remains vital because the forms of action of the

state and federal proceedings were different and the writ of mandamus issued in Plain Dealer did not order prospective relief. The argument honors form over substance.

The ruling in Plain Dealer establishes the standard of conduct to be followed in Cleveland as well as other Ohio municipalities having comparable charter provisions. Conformity with that standard is not "voluntary cessation" of wrongful conduct, but a duty now imposed by law upon Cleveland's officials. There has been no breach of that duty and none can be reasonably anticipated.[2] Should

---

2 Petitioner cites the Court to a newspaper article reporting that Cleveland's Council President was considering holding split meeting of the Cleveland Council to avoid the requirements of Plain Dealer (Petition p. 12, footnote 3). Assuming the article correct, Mr. Forbes apparently thought better of the idea since no such meetings were held.

the duty at some time be breached, there are abundant remedies at state law, including the writ of mandamus available at each of the three tiers of Ohio judicial system and declaratory and anciliary relief under the Ohio variant of the Uniform Declaratory Judgment Act, Constitution, State of Ohio, Article IV, Sections 2 and 3; Ohio Revised Code Section 2723.01, Sections 2721.01 et seq.

Nor would petitioner be precluded from pursuing a federal remedy on a fresh rather than stale state of fact. As this Court recently reiterated "... vacation and dismissal of the complaint that has become moot 'clears the path for future relitigation of the issues between the parties' should subsequent events rekindle their controversy." Deakins v. Monaghan, ___ U.S. ___, 108 S. Ct. 523, 529, footnote 5 (1988).

Neither Powell v. McCormack, 395 U.S. 486 (1969) nor Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974), relied upon by petitioner provides a basis for bringing this case back to life. In Powell, a claim for the unconstitutional deprivation of the salary of Representative Adam Clayton Powell during the 90th Congress was a live and justiciable issue which precluded dismissal for mootness even though Representative Powell was subsequently seated by the 91st Congress.

Similarly, in Super Tire there remained an ongoing dispute concerning a New Jersey statute providing welfare benefits to striking employees. The Super Tire court concluded that it is sufficient to avoid mootness to show "the existence of an immediate and definite governmental action or policy

that has adversely affected and continues to affect a present interest (416 U.S. at 125, 126). In the case at bar, the practice complained of was terminated by writ of the Ohio Supreme Court.

Neither case turned as petitioner suggests, on the existence of a request for multiple forms of relief, but rather upon the continuing vitality of the controversy.

Nor is petitioner accurate in characterizing various cited decisions from the Second, Fifth, Seventh and Ninth Circuits as applying a "multiple relief standard" (Petition, p. 16). Each cited case was found by the deciding court to involve a governmental policy or practice which either continued or bore a reasonable expectation of repetition.

For example, in Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986), a United States attorney's investigation into possible voting fraud by naturalized voters, although terminated, was found to present justiciable issues under the "capable of repetition yet evading review" doctrine. In a similar vein, in Florida Board of Business Regulation v. National Labor Relators Board, 605 F.2d 916 (5th Cir. 1979) the challenged governmental practice (an NLRB assertion of jurisdiction) continued although the event which raised the issue had concluded. Each cited circuit court decision is altogether reconcilable with the holding of the Sixth Circuit at issue here.

Here there is simply no ongoing dispute having the vitality essential to

adjudication, but rather the desire of a party and its counsel to pursue an advisory opinion on an issue of constitutional dimension.

It may well be that this Court will at some time choose to adjudicate the issue of whether the First Amendment provides a right of public access to meetings of local legislators. This case is hardly the vehicle for such an adjudication, the Ohio Supreme Court having conclusively decided that in Cleveland, the public and its delegates of the press have that right because of the wording of a municipal charter adopted by the electors of the City.

CONCLUSION

Respondents respectfully request that the Petition for Writ of Certiorari be dismissed.

Respectfully submitted,

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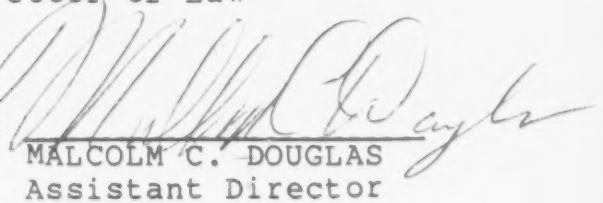
Director of Law

By: 
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